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RIEF

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No. 16-1161

IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF FOR CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amici are professors of law who teach, research, and write about constitutional law and are interested in its history and development:

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Amici respectfully submit this brief to provide the Court with the historical and constitutional background of the judicial manageability requirement as used in prior decisions on justiciability. In particular, *amici* wish to provide historical context showing why the Court should not, as defendants here urge, adopt and extend the plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Defendants contend that judicial manageability is an independent, free-standing factor that, even in the absence of the commitment of an issue to the discretion of a political branch, justifies holding fundamental constitutional

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored any part of this brief, and no person other than the named *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

issues nonjusticiable as political questions. This view of judicial manageability is inconsistent with historical treatment of the factor and undermines the Court's essential role of interpreting the Constitution and protecting constitutional rights.

INTRODUCTION AND SUMMARY

Defendants urge the Court to hold in this case that the political question doctrine categorically bars political gerrymandering claims. But rather than rest their argument on a demonstrable commitment of such claims to the political branches, defendants rely solely on the supposed absence of judicially discernible and manageable standards for administering such claims. *See* Appellants' Br. 34–41. That is not an approach a majority of this Court has ever adopted, and it should not do so here. As plaintiffs explain, the test employed by the district court in this case is both judicially discernible and manageable. Appellees' Br. 32–55. But even more fundamentally, judicial manageability is not properly treated as a free-standing ground for deeming political gerrymandering claims nonjusticiable in the first place.

Traditionally, this Court's political question jurisprudence has focused primarily on whether the question at issue is committed to the unreviewable discretion of one of the political branches. This Court has considered judicial manageability and other prudential considerations as factors that may be useful in determining whether there is such a commitment. In addition, the absence of judicially discernible and manageable standards may be a reason to rule that no constitutional violation has occurred. But a majority of this Court has never held that judicial manageability alone, without commitment of an issue

to a political branch, may justify holding a constitutional issue nonjusticiable. Adopting the position defendants urge here would thus be a gross departure from our constitutional history and tradition.

Adopting that position would also cast doubt on *Baker v. Carr*, 369 U.S. 186 (1962), and numerous other prior decisions. Defendants contend that partisan gerrymandering claims are nonjusticiable because the Court lacks historically based, comprehensive and neutral principles for redistricting, or any limited and precise test for identifying political gerrymandering. This Court, however, rejected just such an argument in *Baker* itself. *Compare id.* at 237 *with id.* at 299–301 (Frankfurter, J., dissenting) (arguing that a one-person-one-vote claim is nonjusticiable for lack of a comprehensive background theory of representation). Moreover, the Court routinely addresses issues without first elaborating a comprehensive background theory and uses broad, open-ended standards rather than precise and formalistic tests.

Finally, treating judicial manageability as a free-standing justification for applying the political question doctrine would have harmful practical consequences. As the concurrence in *Vieth* recognized, doing so would short-circuit the judicial process and foreclose courts from benefitting from broader experience or new developments that may enable them to fashion manageable standards. Expanding the use of judicial manageability as a threshold test would also threaten to leave constitutional violations without remedies, which in turn would encourage additional violations. And treating judicial manageability as a free-standing justification to decline review would give

courts broad, unguided discretion to selectively abdicate their duty to remedy constitutional violations—discretion that this Court repeatedly has declined to countenance.

The Court should affirm the decision below.

ARGUMENT

I. TREATING JUDICIAL MANAGEABILITY AS A FREE-STANDING JUSTIFICATION FOR DEEMING AN ISSUE A NONJUSTICIABLE POLITICAL QUESTION WOULD DEPART FROM OUR CONSTITUTIONAL HISTORY AND TRADITION

A. A Majority Of The Court Has Never Treated Judicial Manageability As A Free-Standing Justification For Nonjusticiability

Judicial manageability is one of several factors considered in applying the political question doctrine. *See, e.g.*, *Baker*, 369 U.S. at 217. It has been described as a consideration of "importance," *Vieth*, 541 U.S. at 278 (plurality opinion), and even as one of the "dominant considerations" in applying the doctrine, *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (plurality opinion). But unlike standing, ripeness or mootness, judicial manageability has never been treated by a majority of this Court as an independent, free-standing justification for ruling an issue

nonjusticiable.[2] To the contrary, judicial manageability has been treated at most as a supporting consideration in the primary inquiry in political question analysis: whether an issue has been committed to the unreviewable discretion of the political branches.

The origin of the political question doctrine is commonly traced to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002); Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 598 n.4 (1976). *See generally* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1910 & n.4 (2015).

Marbury recognized that, "'where there is a legal right, there is also a legal remedy ... when ever that right is invaded,'" 5 U.S. at 163 (quoting 3 William Blackstone, COMMENTARIES *23), and that courts may, where vested with jurisdiction, properly review the constitutionality of laws. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). At the same time, however, *Marbury* recognized that, where "the president is invested with certain important political

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[2] The views of various Justices who have considered such an approach have never garnered a majority of the Court. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511–12 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part); *Vieth*, 541 U.S. at 277–306 (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 147–61 (1986) (O'Connor, J., concurring in the judgment).

powers, in the exercise of which he is to use his own discretion," such as the selection of subordinate officers, the President's actions are "only politically examinable." *Id.* at 165. Thus, "[q]uestions in their nature political or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170.

Subsequent cases held that certain questions were nonjusticiable political questions because they were committed unreviewably to the discretion of the political branches by the text of the Constitution, its structure, or historical practice. For example, in *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), the Court held that a plaintiff challenging fines for failing to report for military duty could not dispute the President's decision to call forth the militia because the statute authorizing the President to do so entrusted him with exclusive discretion over the decision. *Id.* at 28–32. In other cases, the Court held that the executive branch is entrusted with unreviewable discretion in determining to which nation an island belongs, *see, e.g., Jones v. United States*, 137 U.S. 202, 221 (1890); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839), identifying the legitimate government of foreign states, *see, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Kennett v. Chambers*, 55 U.S. 38, 50–51 (1852), and ascertaining whether a treaty continues in force or has been extended, *see, e.g., Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Doe v. Braden*, 57 U.S. (16 How.) 635 657 (1854).

The Court has similarly held some questions committed to the unreviewable discretion of Congress. These questions include recognition of international boundaries, *see, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.)

253, 309 (1829); *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 517–18 (1838), recognition of Indian tribes, *see, e.g., In re Kan. Indians*, 72 U.S. (5 Wall.) 737, 755–57 (1867), and recognition of the lawful government of individual States for purposes of the Guaranty Clause, *see, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

In many of these decisions, the Court supported the conclusion that an issue was committed unreviewably to the discretion of the political branches with practical considerations such as the need for "prompt and unhesitating obedience" to orders calling forth the militia, *see, e.g., Martin*, 25 U.S. (12 Wheat.) at 30, or the need for uniformity in dealing with foreign countries, *see, e.g., Williams* , 38 U.S. (13 Pet.) at 420. In one case, *Luther v. Borden*, the Court noted the absence of any reliable manner in which courts can determine the lawful government of a State in the midst of civil unrest such as the Doerr Rebellion, 48 U.S. (7 How.) at 41–42, in addition to the textual commitment of issues concerning the legitimacy of state governments to Congress, *id.* at 42–43. Notably, however, when the Court next considered a question concerning a state government's conformity with the Guaranty Clause and relied on *Luther v. Borden*, it did not mention this judicial manageability consideration, instead noting only the decision's ruling that the issue was textually committed to Congress. *See Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 145–48 (1912).

To be sure, some later political question decisions mention judicial manageability as a factor in considering whether an issue has been committed to another branch, but none treats judicial manageability as a free-standing justification for nonjusticiability. For example, in *Coleman v. Miller*, the Court held

nonjusticiable the determination of time limits on state ratification of constitutional amendments under Article V. 307 U.S. at 456. While the Court described "the lack of satisfactory criteria for a judicial determination," along with the need for finality, as "dominant considerations," *id.* at 454–55, it ruled principally that the issue rested exclusively with Congress, *id.* at 456. While a majority of the Court quoted this language two decades later in *Baker v. Carr*, 369 U.S. at 210, that decision rejected any political question argument and permitted equal protection challenges to legislative districting, *id.* at 208–37.

More recent decisions similarly take cognizance of judicial manageability but do not hold that it alone renders an issue nonjusticiable. Some decisions mentioning judicial manageability, for example, treat it as the only factor to be considered in political question analysis in addition to commitment to the political branches. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) ("[A] controversy involves a political question where there is a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.") (quotation marks omitted); *id.* at 203-04 (2012); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (same).

But none of the decisions mentioning judicial manageability find it a free-standing justification for nonjusticiability. Most simply reject political question challenges. *See Zivotofsky*, 566 U.S. at 196–201; *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458-59 (1992); *INS v. Chadha*, 462 U.S. 919, 941–43 (1983); *Powell v. McCormack*, 395 U.S. 486, 549

(1969). And even where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches. *See Nixon v. United States*, 506 U.S. at 229–36 (ruling impeachment trial procedures textually committed to the unreviewable discretion of the Senate); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (ruling National Guard training "entrusted expressly to the coordinate branches of government"). Thus, the Court has consistently stated that the primary inquiry under the political question doctrine is "'whether a matter has in any measure been committed by the Constitution to another branch.'" *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting *Baker*, 369 U.S. at 211); *accord Powell*, 395 U.S. at 521, and judicial manageability is at most a subordinate part of that inquiry, *see Nixon v. United States*, 506 U.S. at 228–29.

For all these reasons, defendants' proposal that political gerrymandering is a nonjusticiable political question based solely on judicial manageability, absent any commitment of the matter to the political branches, is historically anomalous and contrary to our constitutional tradition. Just as other issues concerning redistricting have long been held justiciable and *not* committed to the sole discretion of Congress or the States, *see, e.g., Baker*, 369 U.S. at 237, so should the issue of political gerrymandering be deemed justiciable. As the concurring opinion in *Vieth* noted, the Court's very willingness to "enter the political thicket of the apportionment process with respect to one-person, one-vote claims" in *Baker v. Carr* and its progeny "makes it particularly difficult to justify a categorical refusal to entertain claims against this

other type of gerrymandering." 541 U.S. at 310 (Kennedy, J., concurring in the judgment).

B. Treating Judicial Manageability As A Free-Standing Justification For Nonjusticiability Would Cast Doubt On *Baker v. Carr* And Other Decisions Of The Court Rejecting The Need For Comprehensive Theories Or Rigid Rules

Treating judicial manageability as a free-standing justification for applying the political question doctrine would further depart from our constitutional history and tradition by casting doubt upon *Baker v. Carr* and other precedents. Defendants urge the Court to find nonjusticiability here because there are no "historically-derived 'comprehensive and neutral principles' for redistricting." Appellants' Br. 37 (quoting *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment)).[3] But this Court explicitly rejected that very proposition in *Baker v. Carr*.

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[3] Defendants misstate the *Vieth* concurrence, which did not suggest that the political question doctrine demands a comprehensive background theory as a precondition to justiciability. Rather, consistent with *Baker v. Carr*, the concurrence described the lack of comprehensive and neutral principles for drawing electoral boundaries as one of the "obstacles" to political gerrymandering claims. 541 U.S. at 306–07 (Kennedy, J., concurring in the judgment). Indeed, the concurrence explicitly recognized that, where important rights are involved, the "impossibility of full analytical satisfaction is reason to err on the side of caution." *Id.* at 311.

In dissent in *Baker v. Carr*, Justice Frankfurter argued that the claims of the plaintiffs there that they had been denied a proportionate share of political influence were not justiciable because courts "do not have accepted legal standards or criteria or even reliable analogies to draw upon" for resolving such claims. 369 U.S. at 268 (Frankfurter, J., dissenting). Underlying these claims, Justice Frankfurter reasoned, was a theoretical question about the "base of representation in an acceptably republican state." *Id.* at 301. He wrote:

> One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

Id. at 300. Finding no "universally accepted" answer to this question in U.S. or British history, Justice Frankfurter's dissent concluded that the plaintiffs' apportionment claims were nonjusticiable political questions. *Id.* at 301–24.

A majority of the Court disagreed, holding that "the complaint's allegations of denial of equal protection present a justiciable constitutional cause of action." *Id.* at 237. As the majority identified no comprehensive and neutral background theory of representation, defendants' argument that the political question doctrine demands such a theory cannot be reconciled with *Baker v. Carr*. To the contrary,

defendants simply ignore the decision, thereby implicitly conceding that their argument contradicts it.

Moreover, there is no basis for imposing a threshold requirement of "historically-derived, comprehensive and neutral principles" before Article III jurisdiction may be exercised. The absence of such principles may be an "obstacle[]," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), to finding a constitutional violation. But it does not bar the Court from even considering whether there has been a constitutional violation. To the contrary, the Court adjudicates constitutional challenges where admittedly there was no comprehensive background theory. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (finding no need for "an exhaustive historical analysis today of the full scope of the Second Amendment").

Once again picking up on language in the *Vieth* concurrence, defendants also argue that, if political gerrymandering claims are permitted, courts may be forced to assume "'political, not legal, responsibility for a process that often produces ill will and distrust.'" Appellants' Br. 39 (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment)). While that is true, it is equally true of apportionment claims, which often force courts "to draw or approve election district lines." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring).

Finally, defendants argue (Appellants' Br. 40) that the political question doctrine bars political gerrymandering claims because plaintiffs have not proposed a "limited and precise *test*" for such claims. The absence of judicially discernible and manageable standards may affect the determination whether there has been a constitutional violation. *See, e.g.*, *Garcia v.*

San Antonio Metro. Transit Auth., 469 U.S. 528, 537–47 (1985). But this Court has not shied away from addressing questions, much less foreclosed all future consideration of those questions, simply because they are "not susceptible to the mechanical application of bright and clear lines." *United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring); *see also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines," in addressing constitutional questions).

Indeed, the Court often applies broad, open-ended standards in determining whether constitutional violations have occurred. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 538 (2011) (determining constitutionality of prison population levels even though the inquiry is based on "uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (noting that the Court has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–85 (1996) (providing three "guideposts" for determining when punitive damages are so excessive as to violate due process); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (requiring preventive remedies adopted under the Fourteenth Amendment's Enforcement Clause to be "congruen[t] and proportion[al]" to the harm to be prevented); *Planned Parenthood of Southeastern Pa. v.*

Casey, 505 U.S. 833, 870–79 (1992) (prohibiting abortion regulations that impose an "undue burden" on a woman's right to choose) (plurality opinion); *see also Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept ... not readily, or even usefully, reduced to a neat set of legal rules").

This is especially true in election law cases. *See, e.g., Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1667 (2015) (entertaining challenge to contribution restrictions enacted to serve an interest in preserving public confidence in the judiciary, even though such a governmental interest "does not easily reduce to precise definition" or "lend itself to proof by documentary record"); *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1451 (2014) (entertaining challenge to aggregate limits on campaign contributions even though the "line between quid pro quo corruption and general influence may seem vague at times"); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (entertaining challenge to voter identification law despite absence of "any litmus test for measuring the severity of a burden that a state law imposes"); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (holding filing deadline for independent candidate unconstitutional even in the absence of any "'litmus-paper test' separating valid from invalid restrictions) (quotation marks omitted).

For example, in *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court considered the constitutionality of contribution limits imposed by a Vermont election law, determining whether the limits were "'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 247 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)). The Court acknowledged that it had "no scalpel to probe each possible contribution level" and

could not "determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Id.* at 248 (quotation mark omitted); *see also id.* at 265 ("no traditional or well-established body of law exists to offer guidance") (Kennedy, J., concurring in the judgment). Nonetheless, it considered the issue, ruling that Vermont's contribution limits were "disproportionately severe," *id.* at 237, based on various "danger signs," *id.* at 249–53, and "factors" indicating, that the contribution limits were "so low" that they posed significant obstacles to candidates in contested elections, *id.* at 253, 256.

Similarly, in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the Court considered whether due process required a state supreme court justice to recuse himself from a case involving a party who, in addition to making the maximum contribution to the justice's election campaign, also contributed nearly $2.5 million to an organization supporting the justice and made over $500,000 in independent expenditures on the justice's behalf. *Id.* at 873. The Court recognized that "'what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision,'" *id.* at 879 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986)), and that determining whether a judge is actually biased is "a difficult endeavor, not likely to lend itself to a certain conclusion," *id.* at 885; *see also id.* at 893–98 (Roberts, J., dissenting) (listing several dozen unresolved theoretical issues). Nevertheless, a majority of the Court concluded that due process required the judge to recuse himself because "the probability of actual bias on the part of the judge" was "too high to be

constitutionally tolerable." *Id.* at 872 (quotation marks omitted).

Measuring the impact of partisan gerrymandering and determining when a party has gone too far in seeking partisan advantage is no more difficult than determining when contribution limits are too low or campaign contributions create too great a risk of bias. There is no historically derived, comprehensive and neutral theory, nor any limited and precise test to use in any of these circumstances. If cases such as *Randall* and *Caperton* presented justiciable questions, political gerrymandering cases must be justiciable as well. The Court's tradition of flexible, open-ended analysis cannot be reconciled with defendants' rigid requirement of a "limited and precise *test*" for resolving the claims here.

II. TREATING JUDICIAL MANAGEABILITY AS A FREE-STANDING JUSTIFICATION FOR DEEMING AN ISSUE A NONJUSTICIABLE POLITICAL QUESTION WOULD HAVE HARMFUL PRACTICAL CONSEQUENCES

Expanding the role of judicial manageability in political question analysis and treating it as a free-standing justification for holding claims nonjusticiable would also short-circuit the judicial process, leave constitutional violations unremedied, and indirectly give courts freewheeling discretion to selectively abdicate the responsibility to address constitutional claims—a discretion that this Court repeatedly has declined to grant directly. For these reasons too, *amici* respectfully urge the Court to reject defendants' judicial manageability argument.

First, treating judicial manageability as an independent, free-standing justification for finding a

question nonjusticiable as a political question would undermine the judicial process. The law frequently develops on an incremental basis as courts, based on experience in individual cases with different aspects of an issue, develop principles, tests, or standards to govern that issue. This process allows courts to deal with and benefit from initially unseen aspects of an issue. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) ("[I]n another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights to fair and effective representation"). This process also allows courts to adapt to new technologies. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31–40 (2001); *Katz v. United States*, 389 U.S. 347, 353 (1967); *see also Vieth*, 541 U.S. at 312–13 ("new technologies may produce new methods of analysis that ... facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards").

Treating judicial manageability as a free-standing justification for rendering claims nonjusticiable as political questions would short-circuit this process. The traditional approach allows judges to consider claims even though they cannot know whether they have encountered all aspects of an issue or whether future developments will put courts in a better position to address the issue. Giving courts the power to render issues permanently nonjusticiable based solely on judicial manageability, by contrast, would stop this salutary process before it begins.

Second, treating judicial manageability as a free-standing justification for nonjusticiability would leave constitutional violations unremedied. Sometimes the political question doctrine is properly used to preclude

courts from resolving factual questions that the political branches are better suited to deciding, such as where international boundaries are drawn, *see, e.g.*, *Foster*, 27 U.S. (2 Pet.) at 309, or what country has sovereignty over an island, *see, e.g.*, *Williams*, 38 U.S. (13 Pet.) at 420. But the doctrine may also be misused to bar consideration of constitutional claims, leaving constitutional violations without judicial remedy. *See, e.g.*, *Nixon v. United States*, 506 U.S. at 228–36; *Gilligan*, 431 U.S. at 6–12. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224–26 (1978). Indeed, in *Vieth* itself, it was undisputed that political gerrymandering may violate the Equal Protection Clause,[4] but the plurality

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[4] *Vieth*, 541 U.S. at 292–93 (plurality opinion) (agreeing that "an *excessive* injunction of politics [into redistricting] is *un*lawful"); *id.* at 307 (Kennedy, J, concurring in the judgment) ("A determination that a gerrymander violates the law must rest on ... a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."); *id.* at 326 (Stevens, J., dissenting) ("the plurality's opinion ... seems to agree that if the State goes 'too far' ..., it violates the Constitution"); *id.* at 343 (Souter, J., dissenting) ("[I]f unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality."); *id.* at 362 (Breyer, J., dissenting) ("[G]errymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause."); *see also Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("Partisan gerrymanders, this Court has recognized, are incompatible with democratic principles.") (quotation marks and alterations omitted).

declined to reach the merits out of concern that the tests proposed in that case were not sufficiently definite. *Vieth*, 541 U.S. at 277–305 (plurality opinion).

It is, however, "not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied." *Vieth*, 541 U.S. at 309–10 (Kennedy, J., concurring in the judgment). To the contrary, "[w]here important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution," not to foreclose any remedy. *Id.* at 311. Indeed, by refusing to entertain claims of constitutional violations, court may increase the temptation of political bodies to act in an unconstitutional manner, thereby encouraging future constitutional violations as well as leaving past violations unremedied. *Id.* at 312.

Third, treating judicial manageability as a free-standing ground for finding claims nonjusticiable gives courts vast discretion to selectively abdicate their obligations to entertain constitutional claims. As this Court repeatedly has recognized, "'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)); *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Thus, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to

the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Indeed, a free-standing notion of judicial manageability is itself vague and unmanageable in any consistent way. The Court has a variety of tools for dealing with difficult and complex issues, such as making narrow rulings that address only a small aspect of such issues or broader rulings that leave open to future consideration more particularized determinations. But there are no rules or standards by which to determine when these tools are unavailable and an issue is unmanageable. Indeed, defendants' arguments illustrate the absence of any principled guidelines by which to apply judicial manageability as a free-standing justification for nonjusticiability. Defendants argue that the standards proposed by the trial court and the plaintiffs are unmanageable because they are based on improper assumptions (Appellants' Br. 49), distort the role of voting in the democratic process (*id.* at 50), are biased (*id.* at 50–51), suffer from "technical defects" (*id.* at 51), and are overbroad (*id.* at 52). But all these points in fact address the merits of the proposed tests and furnish no reason to foreclose the inquiry by exercise of the political question doctrine.

Thus, in addition to short-circuiting the judicial process and leaving constitutional violations unremedied, treating judicial manageability as a free-standing justification for finding a question nonjusticiable would give courts inappropriate discretion to selectively abdicate their duties to decide constitutional claims and remedy constitutional violations.

CONCLUSION

The judgment should be affirmed.

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Respectfully submitted,

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APPENDIX

APPENDIX A

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